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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM M. CORRIGAN,
Petitioner,

vs.

MARY SUSAN GOODWIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a State Judge of general jurisdiction is immune from suit for damages under 42 U.S.C. § 1983 when he transfers a female attorney from a temporary position of Administrative Hearing Officer to the Permanent position of Legal Advisor, said action being a judicial act as defined by the Missouri Supreme Court.

2. Whether sufficient evidence was presented at trial to sustain the damage verdict for sexual discrimination under 42 U.S.C. § 1983.[1]

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[1] Other parties to this suit, also defendants in the original action, are the St. Louis County Circuit Court En Banc and St. Louis County. The United States Court of Appeals for the Eighth Circuit, in the Opinion attached in the Appendix to this Petition, retain jurisdiction over those appeals, while remanding them to the District Court for further findings. Counsel for St. Louis County has informed Petitioner that it will petition this Court for certiorari in the event that the Eighth Circuit concludes that it is jointly liable in this case. Counsel for the St. Louis County Circuit Court En Banc has informed Petitioner that it will join Petitioner in this action if the Eighth Circuit concludes that it is jointly liable and if the Writ prayed for herein is granted.

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WILLIAM M. CORRIGAN,
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MARY SUSAN GOODWIN,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner William M. Corrigan Respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 6th, 1984.

OPINION BELOW

The Opinion of the Court of appeals is reported at 729 F.2d 541. The Opinion of the District Court relevant to the issues presented by this Petition For Certiorari appears at 555 F.Supp. 658.

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on March 6th, 1984. This Petition For Certiorari

was filed within ninety days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In 1979, Judge William Corrigan, Petitioner herein, was asked by several other Circuit Judges in the Twenty-Second Judicial Circuit, State of Missouri, to assume the position of Presiding Judge of the Juvenile Court in order to restore public confidence, which had been shaken by adverse publicity, in that branch of the Court. At the time Petitioner accepted the position of Presiding Judge, the Juvenile Court employed three attorneys as hearing officers. The function of a hearing officer was to make initial findings of fact and conclusions of law which were then presented to the Presiding Judge for his review. On the basis of the information provided by the hearing officer, the Presiding Judge would make his ruling.

After an examination of the cases pending in court, Petitioner decided that the case load was insufficient to support the position of hearing officer, and that he and his commissioners could hear all the cases. Petitioner decided to eliminate two hearing officers immediately and the third when pending legislation was enacted removing traffic offenses from juvenile court jurisdiction. A male hearing officer volunteered for a position in the legal department. Petitioner then consulted with other supervisory personnel of the Juvenile Court with regard to whether Respondent or Craig Donis should be transferred to the permanent legal staff. Petitioner decided to transfer Respondent to the permanent legal staff and leave Donis to hear traffic cases, pending legislative action abolishing that function of the court. Seven months later, the Missouri legislature enacted legislation removing traffic cases from the Juvenile Courts and Mr. Donis was terminated. The pay and fringe benefits of a hearing officer and a legal staff member were the same.

Respondent filed suit in the United States District Court, Eastern District of Missouri, Eastern Division, Judge Clyde S.

Cahill Presiding, alleging that Petitioner's actions in transferring her to the legal staff were sexually discriminatory in violation of Title 42 United States Code § 1983. Respondent presented evidence that, three days before making his decision about whom to transfer to the permanent legal staff, Judge Corrigan stepped into the office of Commissioner Branom at the Juvenile Court and reportedly said, "This Court will never run well so long as there are women in charge." Commissioner Branom testified at trial that this remark was made in jest, and that it referred to a Corrine Richardson, the then Director of the legal department. Respondent further produced evidence that, after the filing of this action, at a meeting of the court en banc called to discuss the defense of the court, Judge Corrigan remarked to the Judge who had originally hired Respondent that this litigation was all his fault because he "had taken her out of the kitchen, taken her apron off, and put a robe on her." Some testimony indicated this was said in jest, other testimony indicated uncertainty as to the intent of this remark.

The trial court refused to grant Judge Corrigan immunity, either absolutely or qualifiedly, and refused to submit a good faith instruction to the jury. The jury awarded Respondent nominal damages of $1.00 and punitive damages of $1,000.00. The trial court awarded Respondent $17,972.29 in attorneys' fees and costs under 42 U.S.C. § 1988.

A three Judge panel of the United States Court of Appeals for the Eighth Circuit, Judge Bowman dissenting, affirmed the District Court's action in sustaining the jury verdict and awarding attorneys' fees. The Eighth Circuit held that Respondent presented sufficient evidence for the jury to determine that Petitioner's conduct was either motivated by evil motive or intent or was recklessly or callously indifferent to Respondent's rights. The Eighth Circuit further held that qualified immunity and a good faith defense were not available in this case and that absolute immunity was unavailable because Petitioner's acts were not within his official judicial capacity.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the liability for damages of State Court Judges of general jurisdiction under 42 U.S.C. § 1983. The Court of Appeals found that the transfer of Respondent from the position of Administrative Hearing Officer to a position on the permanent legal staff was not a judicial act and, therefore, no immunity from suit for damages was available. The holding of the Court of Appeals both misreads this Court's pronouncements on judicial immunity and seriously impairs the free and unfettered functioning of State Court Judges. This holding chips awary at the scope of judicial immunity and exposes State Court Judges to a dual standard for immunity. A Judge whose acts are within his jurisdiction under the law of his State may find himself exposed to liability for damages under a substantially narrowed federal definition of jurisdiction. This decision not only recreates the exact problem which judicial immunity was created to solve, but so deviates from this Court's thinking in *Stump v. Sparkman,* 435 U.S. 349 (1978) that review of the decision below is essential.

I

The Decision Of The Court Of Appeals Conflicts With All Relevant Decisions Of This Court, Particularly Stump v. Sparkman, In That It Abrogates All Immunity, Absolute Or Qualified, Of A State Court Judge Of General Jurisdiction, Acting Within His Jurisdiction As Defined By The Missouri Supreme Court.

In 1872, this Court first examined fully the common law doctrine of judicial immunity in *Bradley v. Fisher,* 13 Wall. 335 (1872). The Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him [should] be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to

answer to everyone who might feel himself agrieved by the actions of the Judge, would be inconsistent with the possession of this freedom, and would destroy the independence without which no judiciary can be either respectable or useful" 13 Wall at 347. This immunity exists even when a Judge acts in excess of his jurisdiction and the act is alleged to have been done maliciously or corruptly, *Stump v. Sparkman, supra* at 355. In *Pierson v. Ray,* 386 U.S. 547 (1967), this Court held that the doctrine of judicial immunity was applicable to suits brought under Subsection 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 because the legislative record failed to indicate any intent to abolish this established common law principle.

This Court's decision in *Stump v. Sparkman, supra,* began the process of defining the breath of judicial immunity. *Stump,* at 360, recognized that "[t]his court has not had occasion to consider, for purposes of the judicial immunity doctrine, the necessary attributes of a judicial act... ." This Court found that the jurisdiction of a State Court Judge should be determined by looking to the law of the State. Missouri law as to the jurisdiction of its judges is well settled. By statute, "Circuit Judges may hear and determine all cases and matters within the jurisdiction of their courts..." R.S.Mo. 478.220 (1979). The definition of the word "matters," as relevant to this writ, was decided by the Missouri Supreme Court en banc in *Pogue v. Swink,* 284 S.W. 2d 868 (Mo. Banc 1955). The Missouri Supreme Court held that "[E]ven in the absence of specific statutes on the subject, courts of general jurisdiction have the inherent power to do all things reasonably necessary to preserve their existence and function as a Court and have the power to appoint necessary attendants, including clerks and janitors," *Pogue, supra* at 872. The Court in *Pogue* found that salary and tenure decisions related to employees of the Court require the exercise of judicial discretion and were acts within the Court's jurisdiction to which judicial immunity applied. *Pogue* has noted as authority by the Missouri Supreme Court en banc as recently as June of 1983 in *Sherrill v. Wilson,* 653 S.W. 2d 661, 665 (Mo. Banc. 1983).

In *Stump v. Sparkman,* this court was faced with a situation where neither the legislature nor the courts of Indiana had spoken directly to the issue of Judge Stump's jurisdiction over sterilization petitions. This Court found that "in our view, it is more significant that there was no Indiana statute and no case law in 1971 prohibiting a Circuit Judge, a Court of general jurisdiction, from considering a Petition of the type presented to Judge Stump," *Stump, supra* at 358. In the instant action, no such void exists. The Missouri Supreme Court en banc has clearly held that employment decisions relating to Court employees are within the jurisdiction of Circuit Judges for purposes of judicial immunity. The Court of Appeals ignored both the directives of this Court and Missouri law and, in a footnote, 729 F 2d 549 n.12 (8th Cir. 1984), dismissed petitioner's claim for judicial immunity. In doing so, the Court of Appeals places State Court Judges in the position of having no reasonable guidelines as to the scope of their jurisdiction. They can clearly no longer rely on their State Supreme Court for guidance. "Imposing such a burden on judges [contributes] not to principle and fearless decisionmaking but to intimidation," *Pierson v. Ray,* 386 U.S. at 554. This Court should grant Petitioner's Writ in order to define the necessary attributes of a judicial act for purposes of the judicial immunity doctrine.

Petitioner argued to both the trial court and the Court of Appeals that if he were not entitled to absolute judicial immunity, he should be entitled to a qualified, good faith, immunity. This Court has examined immunity from damage liability under 42 U.S.C. § 1983 for members of all three brances of government, *Tenney v. Brandhove,* 341 U.S. 367 (1951), *Butz v. Economou,* 438 U.S. 478 (1978), and has found some form of immunity in all cases involving performance of official discretionary acts. Even if the acts of Petitioner are viewed as non-judicial, and thus outside the scope of absolute immunity, they were undisputably official discretionary acts, and Petitioner should be entitled to at least qualified immunity. In *Harlow v. Fitzgerald,* 457 U.S. 800, 813 (1982) this Court recognized that when of-

ficial functions do not rise to the level of absolute immunity "public policy at least mandates an application of the qualified immunity standard...." In the instant action, Respondent was responsible for hearing cases and preparing Findings of Fact and Conclusions of Law for Petitioner's signature. Surely public policy would favor a Judge's freedom to select, without intimidation, the person to perform this task, rather than favoring a right to damages of a female employee who was transferred to the only permanent position available, while her male counterpart was terminated from employment.

The Court of Appeals reads *Harlow* in such a way as to completely do away with qualified immunity. It reasons that if the jury finds liability, good faith could not have existed and therefore qualified immunity does not apply. This reasoning puts the cart before the horse. The purpose of immunity is to prevent litigation against public officials in performance of their official discretionary acts. A test of applicablity of immunity which relies on the jury verdict as a determining factor destroys the entire doctrine. All cases will have to be tried and defended before a determination of the immunity question can be made. If the jury finds for claimant, ipso facto, no good faith defense exists and if the jury finds for defendant, a good faith defense was not necessary. The Court of Appeals Opinion allows the jury to detemine both the sufficiency of the evidence and whether a good faith defense is appropriate. Both are questions of law and not within the province of the jury. The Opinion below further contradicts the very purpose of immunity. "The justification for [immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome, would dampen the ardors of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. * * * The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that

official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him...," *Gregoire v. Biddle,* 177 F. 2d 579, 581 (2nd Cir. 1949) (Learned Hand, J.). In support of its position, the Court of Appeals relies on *Flores v. Pierce,* 617 F. 2d 1386 (9th Cir.) cert. denied 449 U.S. 875 (1980). *Flores* is a case where city officials attempted to prevent two Mexican Americans from obtaining a liquor license because of their national origin. Petitioner submits that *Flores* is so different, both in fact and in policy, that it is not dispositive of Petitioner's immunity.

While Petitioner submits that his acts were judicial in character and thus protected by absolute immunity, if this Court believes that Petitioner's acts were non-judicial, this Writ should still be granted to examine the immunity of State Court Judges when they perform official, discretionary acts which do not relate directly to specific cases.

II

The Quantum Of Evidence Held Sufficient By The Court Of Appeals To Sustain A Punitive Damage Verdict Against A State Court Judge Of General Jurisdiction Under 42 U.S.C. 1983 Calls For The Exercise Of The Supervisory Powers Of This Court.

Respondent presented two items of evidence to show Petitioner's bias against women. That evidence, however, failed to make a submissible case of sex discrimination because it totally failed to show causality.

Taken in the light most favorable to Respondent, the evidence establishes nothing more than an inference that Petitioner wished to rid the Juvenile Court of women. Petitioner's actions were, however, contrary to that inference. He appointed Respondent to a position on the permanent legal staff and left Mr. Donis in the soon to be terminated position of hearing officer. Had Petitioner left Respondent in the position of hearing officer and appointed Mr. Donis to the permanent position, the inference created by his remarks may have been sufficient for Respondent to have made a submissible case, but that is not what occurred. The uncontested actions of Petitioner clearly show that, as to this Respondent in this case, Petitioner was not discriminating on the basis of sex.

This Court has always recognized that a discrimination case requires proof of a causal relationship between the Petitioner's race or sex and the employment decision in question. In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976), a Title VII case, this Court recognized the required showing of a 'but for' connection between the alleged discrimination and the employment decision. The only 'but for' causal relationship that can be drawn from Respondent's evidence is that: Respondent would not have been transferred to a permanent position while her male counterpart was terminated, but for Petitioner's bias against women.

The evidence of sex discrimination presented at trial by Respondent consisted of two remarks made by Petitioner. The first remark, made three days prior to transferring Respondent to a permanent position, was recalled slightly differently by each of Respondent's witnesses. Each, however, agreed as to the general content: "This Court will never run well so long as there are women in charge." The evidence was uncontested that this remark referred to Corrine Richardson rather than Respondent and that Petitioner had a big smile on his face and a twinkle in his eye when the remark was made.

The second item of evidence of sex discrimination was a remark made by Petitioner at a meeting of the court en banc shortly after Respondent filed this lawsuit and over eighteen months after Respondent was transferred to the permanent position which she still occupies. This remark, directed to the Judge who had hired Respondent, was that 'the lawsuit was all his fault because he had taken Respondent out of the kitchen, taken her apron off and put a robe on her.' The possibility that this remark was made in jest was clear in the evidence at trial.

Even assuming that Respondent desired to remain in the position of hearing officer, hearing only traffic cases for a brief period before being terminated, the evidence does not rise to the level of causation necessary to sustain a jury verdict for punitive damages. In *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 (4th Cir. 1982), the Fourth Circuit noted the special problems of proof in discrimination cases. "This emphasis, where causation is dispositive, upon 'probability,' 'reasonable probability,' 'substantial probability,' rather than mere 'possibility' as the proper test simply bespeaks the special danger that in a matter so generally incapable of certain proof jury decisions will be on the basis of sheer speculation, ultimately tipped, in view of the impossibility of choosing rationally between mere 'possiblities' by impermissible but understandable resort to such factors as sympathy and the like. ...[T]he special danger in the causation context invites and justifies the special emphasis."

Respondent's evidence at best presented a possibility that petitioner was biased against women. Petitioner's actions in appointing Respondent to a permanent position, however, contradict that possibility. "Taken altogether . . . claimant's evidence did not suffice to allow a jury to infer that [sex] discrimination was a determining factor in this [transfer]. Though [sex] discrimination is undoubtedly a possibility in any case of this type, and though its easy concealment is a constant danger in attempts to vindicate this statutory right, a jury may nevertheless not be allowed to infer it from evidence that does no more than suggest it as a possibility," *Lovelace* at 245.

This writ should be granted because, as Judge Bowman states in his dissent, "[t]he real issue is not whether Judge Corrigan has or ever had a bias against women. Rather, the issue is whether he made a decision adverse to Goodwin on the basis of her sex. ...[T]he evidence falls woefully short of showing that he did, and accordingly the verdict in Goodwin's favor should not be allowed to stand."

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review of the Judgment and Opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 83-1161 to 83-1163

Mary Susan GOODWIN, Appellee,

v.

The CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI, Appellant,

and

William Corrigan,

v.

ST. LOUIS COUNTY, MISSOURI.

Mary Susan GOODWIN, Appellee,

v.

The CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI, and

William M. Corrigan, Appellant,

v.

ST. LOUIS COUNTY, MISSOURI.

Mary Susan GOODWIN, Appellee,

v.

The CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI, and William M. Corrigan, Appellees,

v.

ST. LOUIS COUNTY, MISSOURI, Appellant.

Submitted Nov. 15, 1983.
Decided March 6, 1984.

Before ROSS, ARNOLD and BOWMAN, Circuit Judges.

ARNOLD, Circuit Judge.

Mary Susan Goodwin, a lawyer, claims that she was removed from her position as a hearing officer for the Juvenile Division of the Circuit Court of St. Louis County, Missouri, because of her sex. She brought this action against the Circuit Court and Judge William M. Corrigan, presiding judge of the Juvenile Division, under 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.[1] A jury awarded plaintiff nominal damages of $1 and punitive damages of $1,000 on her § 1983 claim against Judge Corrigan. The District Court[2] gave plaintiff a declaratory judgment against the Circuit Court on her Title VII claim, holding that she had been discriminated against because of her sex.[3] The District Court also awarded

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[1] Count I of the complaint, based on Title VII, named both the Circuit Court and Judge Corrigan as defendants. Judge Corrigan's motion to dismiss, on the ground that the plaintiff was employed by the Circuit Court, not by him personally, was granted. *Goodwin v. Missouri,* No. 80-1340 C (2) slip op. 3 (E.D.Mo. Feb. 27, 1981) (Nangle, J.) (Designated Record (D.R.) at 37). The Title VII count went to trial against the Circuit Court only.

Count II of the complaint, based on § 1983, also named both the Circuit Court and Judge Corrigan as defendants. The Circuit Court's motion to dismiss, on the ground that as an arm of the State it is immune under the Eleventh Amendment, was granted. *Goodwin v. Circuit Court of St. Louis County, Missouri,* No. 80-1340 C (2), slip op. pp. 7-8 (E.D.Mo. Dec. 4, 1981) (Nangle, J.) (D.R. at 83-84). The § 1983 count went to trial against Judge Corrigan only.

The two counts were tried at the same time, the Title VII count to the court, and the § 1983 count to a jury.

Plaintiff does not ask us to review the orders of dismissal just described.

[2] The Hon. Clyde S. Cahill, United States District Judge for the Eastern District of Missouri.

[3] No back pay was awarded, because plaintiff was transferred to an attorney position, that paid no less than the salary of hearing officers. Reinstatement was denied because the hearing officer position no longer exists. Plaintiff has not appealed from these rulings.

plaintiff attorneys' fees and costs of $17,972.29, this award being made against the Circuit Court under 42 U.S.C. § 2000e-5(k) and against Judge Corrigan under 42 U.S.C. § 1988. In addition, the Circuit Court was awarded judgment on its third-party claim against St. Louis County, requiring the County to reimburse the Court for whatever the Court had to pay Goodwin.

Judge Corrigan, the Circuit Court, and the County appeal. We affirm the judgment against Judge Corrigan. There was sufficient evidence to take the case to the jury on the issue of sex discrimination under Section 1983. As to the Title VII claim, we hold that the District Court erroneously placed the burden of proof on the Circuit Court. The judgment against the Circuit Court is vacated, and the cause remanded for a new finding to be made under the correct legal standard, which places the burden of persuasion on the issue of discrimination on the plaintiff. The appeal of the third-party defendant St. Louis County will be held in abeyance pending the District Court's new finding on the Title VII claim and our review of that finding. If in the end the Title VII claim is held to be without merit, the third-party action will be moot and fall of its own weight. Judgment against the third-party defendant is based solely on the Title VII judgment against the Circuit Court. Judge Corrigan does not have a judgment over against the County for reimbursement of whatever he must pay out by reason of the Section 1983 claim.

I. The Factual Background.

In November 1971, Judge Robert G. J. Hoester, the Circuit Judge then presiding over the Juvenile Court, hired Goodwin as a hearing officer for the Juvenile Court. She served in this position under four different juvenile judges until March 1979. During this time she heard about 1,000 juvenile status and child neglect cases a year.

In 1979, Judge Corrigan became juvenile judge. He took this job at the urging of several Circuit Judges who felt that he could restore public confidence in the Juvenile Court. Judge Corrigan investigated the situation at the Court and decided to make several changes. One of these changes involved the number of hearing officers. The judge determined that two of the three existing hearing-officer positions could be eliminated, and that the remaining hearing officer would be used to hear juvenile traffic and misdemeanor cases. This remaining position would itself be eliminated if legislation passed removing traffic offenses from Juvenile Court and moving them to adult court. One of the three hearing officers voluntarily stepped down, leaving Goodwin and Craig Donis, who had been a hearing officer for about two years.

On Thursday, March 1, three days before making his decision about whom to retain as a hearing officer, Judge Corrigan stepped into the office of Commissioner Branom at the Juvenile Court and reportedly said, "This court will never run well so long as there are women in charge."[4] Judge Corrigan could not remember making the remark but did not deny that he made it. Branom testified that he laughed at this remark and that Judge Corrigan said it smiling, with "a twinkle in his eye," and made the remark partly to "needle" Branom's secretary, Holly Jaeger, whom the judge had frequently "needled" despite the fact that it upset her. He also testified that in his opinion the expression "women in charge" referred to Corrine Richardson, the director of the legal department. Branom said that shortly before the judge made the remark, he had had a conversation with the judge in which Branom expressed his disapproval of an action that Richardson had taken.

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[4] Another witness testified that Judge Corrigan said, "This Court won't run smoothly until we get rid of these g____d____ women."

The next day Judge Corrigan called upon a four member committee of Juvenile Court officials to express its preference over who should be retained as a hearing officer and who should be moved into the legal department. Two members voted to retain Donis as a hearing officer (Commissioners Lemay and Branom), and two voted to retain Goodwin (Richardson, director of the legal department, and Ken Hensiek, director of social services and chief juvenile officer). Lemay stated he felt that Donis had a better working knowledge of the law than Goodwin, and Bronom stated that Donis was better at trying cases in the courtroom. Richardson testified that she voted to retain Goodwin as a hearing officer because she had prior experience with Donis in the legal department and would feel "comfortable" if he were reassigned there. Hensiek testified that he voted to retain Goodwin as a hearing officer and move Donis to the legal department because he felt Donis had fairly extensive experience with the legal department and was the better person to assume those responsibilities. At the end of the meeting, the judge told the committee members that this was a difficult decision and that he would think about it over the week end and let them know on Monday.

The judge testified that he decided on Sunday, March 3, to retain Donis as hearing officer and move Goodwin into the legal department. He testified that he based this decision on complaints he had heard about Goodwin, specifically that she handled hearings more like a social worker than a judicial officer and that she was deficient in her knowledge of the rules of evidence. On Monday, March 5, he informed Goodwin of his decision.

In October 1980, Goodwin filed this suit for employment discrimination. Shortly thereafter, the judges of the St. Louis County Circuit Court met to discuss the suit. At this meeting, Judge Corrigan stated to Judge Hoester that the litigation was Judge Hoester's fault, because he "had taken [Goodwin] out of the kitchen, taken her apron off, and put a robe on her." Judge

Corrigan testified that he was joking when he made this remark. Judge Hoester testified that he knew that Judge Corrigan often made such remarks in jest but on this occasion was not sure whether the remark was intended as a joke or not.

II. The Jury Verdict Under 42 U.S.C. § 1983.

Judge Corrigan attacks the jury verdict under § 1983 on the following grounds: (1) the District Court committed reversible error by incorrectly instructing the jury that the burden of persuasion was on the defendant; (2) the District Court erred in not instructing the jury on the defense of good-faith immunity; (3) the claim of sex discrimination is not supported by sufficient evidence; and (4) the award of punitive damages is not supported by sufficient evidence and is contrary to the law.[5]

A. The burden of persuasion.

During the plaintiff's closing argument counsel began to say that the defendant must prove his defense. Counsel for Judge Corrigan objected to this statement as a misstatement of the law. The following dialogue then occurred (Tr. 486-87).

> THE COURT: The complication, of course, is that under the existing law the burden on any defendant only becomes a burden if the fact finder finds that the plaintiff has proven a prima facie case of discrimination and that's always subject—because jurors are not accustomed to handling these kinds of cases but under the law, the plaintiff must first make a prima facie showing. Then if the plaintiff makes that prima facie showing the burden shifts

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[5] Judge Corrigan also argues that the court erred in submitting the case to the jury because it lacked jurisdiction because of plaintiff's failure to read a stipulation containing jurisdictional facts into the record. This argument is without merit. A stipulation on file with the court is fully adequate to give the court Title VII jurisdiction. Defendant cites no law which even suggests that the stipulation must be read out loud at the trial.

> to the defendant to show that he did not act in a discriminatory way.
>
> MR. PADBERG: Excuse me, Judge. May I make a record on that, please?
>
> THE COURT: All right. I tell you what we might do. Let me—let me do it this way. I'll sustain the objection to the statement made by Mr. Newman here and we will proceed and you will hear the instructions of the Court. Disregard my oral explanations because I think the instructions make clear to you where the burden and the shifting burden is.

Defense counsel then made no further objection.

The order and burdens of proof laid down by the Supreme Court for Title VII cases apply also to cases of race and sex discrimination in employment brought under 42 U.S.C. §§ 1981 and 1983. See, *e.g., Person v. J.S. Alberici Constr. Co.,* 640 F.2d 916, 918 (8th Cir. 1981) (claim of racial discrimination under § 1981). The burden of persuasion remains at all times on the plaintiff. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981). The District Court's initial statement to the jury that the defendant might have "to show that he did not act in a discriminatory way" was therefore mistaken. But the Court immediately sustained counsel's objection and instructed the jury to disregard "my oral explanations." Appellant argues that this admonition was insufficient to cure the error because the Court still left the impression that when it instructed the jury formally it would have something to say about a "shifting burden." We disagree. The Court's statement, taken as a whole, directed the jury to govern itself by what it would hear in the instructions that would be given after all closing arguments had concluded. When those instructions were read, no objection was made on

burden-of-proof grounds.[6] We are not persuaded that the District Court's momentary lapse worked any actual prejudice to the defendant.

B. Good-faith immunity under § 1983.

Judge Corrigan argues that he was acting in "good faith" and hence is immune from damages for sex discrimination under the doctrine of "qualified immunity." Alternatively, he argues that the District Court erred in refusing to give an instruction on "good faith" immunity.

We reject this argument and hold that the defense of "good faith" or qualified immunity is not available in this case. By definition, there can be no liability in such an action unless the plaintiff shows that the defendant intentionally discriminated against her because of her sex. *Cf. International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977) (disparate-treatment action under Title VII). If the jury finds that intentional discrimination has occurred, and if, as in this case, the evidence is sufficient to support that finding, "good faith" on the part of the defendant is logically excluded. This result is even more strongly indicated after the Supreme Court's recent reformulation of qualified-immunity doctrine in *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Under *Harlow,* a qualified-immunity defense is available if the defendant's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Ibid.* The right to be free of invidious discrimination on the basis of sex certainly is clearly established, and no one who does not know about it can be called "reasonable" in contemplation of law.

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[6] We have not been supplied with a copy of the instructions as read. But the transcript does show the absence of relevant objections, and we feel sure counsel would have told us if the instructions as given had said anything about "shifting burdens."

In *Rodriguez v. Board of Education of Eastchester Union Free School Dist.*, 620 F.2d 362, 366-67 (2d Cir. 1980), it is said, in the context of an action for deliberate sex discrimination under § 1983, that good faith would be a defense against liability for damages. With all deference to the Second Circuit, we are at a loss to understand such a holding. In our view, the proper rule is stated in *Flores v. Pierce*, 617 F.2d 1386, 1391-92 (9th Cir.), *cert. denied*, 449 U.S. 875, 101 S.Ct. 218, 66 L.Ed.2d 96 (1980), decided, as it happens, five days after *Rodriguez*. The *Flores* Court said, in language we adopt as our own:

> No official can in good faith impose discriminatory burdens on a person or group by reason of a racial or ethnic animus against them. The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it. *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958).

This statement is just as applicable to cases of invidious sex discrimination as it is to cases of racial or ethnic discrimination. It was not error for the District Court to refuse to give an instruction on the defense of good-faith or qualified immunity.

C. Sufficiency of the evidence.

Judge Corrigan argues that substantial evidence does not support the jury's finding that he discriminated against Goodwin on the basis of sex. In reviewing the evidence, we are persuaded that Goodwin did present substantial evidence of discrimination.

As direct evidence of discrimination, she presented evidence of two statements that Judge Corrigan made which can reasonably be interpreted to indicate a bias against women. She also presented evidence that he routinely made such statements. The first statement occurred just three days before Judge Corrigan made his decision to transfer Goodwin to the legal depart-

ment. He said, "This court will never run well so long as there are women in charge."[7] While the judge claims that he made this statement in jest, the jury could well have disbelieved him or have felt that jokes like these indicate a bias against women. At about the time this suit was filed, Judge Corrigan said to Judge Hoester that the litigation was Judge Hoester's fault because he "had taken [Goodwin] out of the kitchen, taken her apron off, and put a robe on her."[8] Whether made in jest or not, this statement reflects certain attitudes of Judge Corrigan toward women which might motivate him to treat them differently. Also, Goodwin produced evidence that Judge Corrigan repeatedly needled Holly Jaeger with sexist remarks that upset her. In addition, Goodwin testified that Judge Corrigan accused her of violating the constitutional rights of juveniles although the judge took no steps to determine the correctness of the information on which he based his accusation. In his own defense, Judge Corrigan did not offer any explanation for his accusation. Further, the judge states that he based his decision to transfer Goodwin on complaints he had received, but again he made no efforts himself to verify their accuracy or investigate the basis of the complaints. The jury may have interpreted this as indicating the predisposition of Judge Corrigan to believe that women were not good judicial officers.

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[7] Judge Corrigan argues that the District Court erred in admitting this statement because it is not relevant although it is highly prejudicial. The statement is clearly relevant to determining the judge's motives, directly concerning as it does the question of women in the court, and coming just three days prior to the decision to transfer Goodwin. In addition, defendants made no objection when two of Goodwin's witnesses testified about this statement on direct examination.

[8] Judge Corrigan again argues that the prejudicial value of this evidence exceeds its relevance. We find this argument equally unconvincing. The statement, although made after the alleged discriminatory act, may reflect the attitude of the Judge toward women, even if it was made in jest. The jury has the responsibility of determining what weight to give to the statement.

As to evidence of pretext, Goodwin presented some evidence to rebut the defendant's evidence that Donis was better qualified as a hearing officer. Judge Corrigan essentially claimed that Goodwin was inferior in two respect: (1) her legal ability; (2) her conduct in running hearings in the manner of a social worker. As to her legal abilities, the three juvenile judges prior to Judge Corrigan all roundly praised Goodwin's performance, including her legal abilities. Judge Hoester testified that during his term Goodwin "did a fine job." Judge Lasky likewise testified that during his tour in juvenile court from 1974-76, Goodwin was "a good lawyer," and "an excellent hearing officer." His successor, Judge Edwards, testified that he observed Goodwin on numerous occasions, including the trial of cases, and that she was an "excellent hearing officer" and had a "good knowledge of the law." Further. Goodwin had approximately five years more experience as a hearing officer than Donis. While several witnesses stated that they thought Goodwin's legal abilities were lacking, the jury was free to disbelieve them.

Appellant also argues that the attorney position to which he transferred plaintiff was much more desirable than the hearing-officer position she was forced to leave. The hearing-officer position was to be reduced to handling mainly traffic cases and was in any case to be phased out altogether as soon as the Legislature enacted a desired juvenile-court reorganization. The argument essentially is that Judge Corrigan did Goodwin a favor by transferring her into a permanent position as staff attorney, and that she therefore has no cause to complain. The jury, we suppose, might have accepted such an argument, but it was hardly obliged to do so. Goodwin apparently preferred being a judge for a year to being an assistant prosecuting attorney indefinitely. The jury was within its rights in finding that his preference could not be defeated by invidious discrimination.

D. Punitive damages.

Judge Corrigan argues that the award of $1,000 in punitive damages must be set aside because no evidence supports such damages, because such damages cannot be given without a showing of actual damages, and because the amount of punitive damages is excessive in relation to the actual damages.

We hold that there is sufficient evidence to support the jury's award of punitive damages. This Court has stated that "[p]unitive damages may...be awarded in civil rights actions where the defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or a reckless disregard for the civil rights of the plaintiff." *Guzman v. Western State Bank of Devils Lake,* 540 F.2d 948, 953 (8th Cir. 1976). In *Smith v. Wade,* ____U.S.____, ____, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983), the Supreme Court stated that punitive damages may be obtained under § 1983 when "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Here the statements made by Judge Corrigan could support a jury's finding of intentional or reckless indifference to Goodwin's right to be free from sex discrimination. Juries are uniquely suited to make this kind of moral judgment.

As to the claim that punitive damages may not be awarded unless actual damages are proved, this is not the law. See *Merritt v. De Los Santos,* 721 F.2d 598, 601-02 (7th Cir. 1983); *Ryland v. Shapiro,* 708 F.2d 967, 976 (5th Cir. 1983); *Wilson v. Taylor,* 658 F.2d 1021, 1033 (5th Cir. 1981); *cf. Carey v. Piphus,* 435 U.S. 247, 257 n. 11, 266, 98 S.Ct. 1042, 1049 n. 1, 1053, 55 L.Ed.2d 252 (1978) (implies punitive damages may be awarded even if only nominal damages shown). As to the claim that the punitive damages must be set aside because they are excessive in relation to the actual damages, we see no merit to this argument in cases where only nominal damages are given. If the amount of punitive damages must always depend on actual

damages, it would follow that no punitive damages could be given in cases involving only nominal damages. As just noted, this is clearly not the law. Further, we think the jury's award of $1,000 was not unreasonable under the circumstances and will serve to deter future conduct in violation of civil rights.

III. The Title VII Claim.

The Circuit Court appeals the District Court's Title VII order on several grounds: (1) that the plaintiff could not sue under 42 U.S.C. § 2000e because she was an immediate adviser to an elected official; (2) that the District Court erred in shifting the burden of proof to the defendant; and (3) that the Circuit Court has judicial immunity from this suit. We discuss each argument in turn.

A. Classification of Goodwin as an "employee" under 42 U.S.C. § 2000e(f).

Title 42 U.S.C. § 2000e(f) defines "employee" in pertinent part as follows:

> The term "employee" means an individual employed by an employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.[9]

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[9] As Judge Van Sickle has remarked, this definition is not an example of outstanding draftsmanship, "being a definition subject to an exception which exception is subject to an exception." *Howard v. Ward County*, 418 F.Supp. 494, 502 (D.N.D. 1976).

The Circuit Court argues that Goodwin was an immediate adviser to an elected official and thus does not qualify to sue under Title VII. We reject this argument. The legislative history of this exemption shows that it is meant to apply to those employees who are in "a close personal relationship" with the official. 118 Cong. Rec. 4492-93 (1972) (remarks of Sen. Williams); *Gearhart v. Oregon,* 410 F.Supp. 597, 600-01 (D.Or.1976); *Marafino v. St. Louis County Circuit Court,* 537 F.Supp. 206, 211 (E.D.Mo. 1982), *aff'd per curiam on other grounds,* 707 F.2d 1005 (8th Cir. 1983). Here the testimony clearly showed that Judge Corrigan and Goodwin had very few personal contacts. Thus the job did not entail the sort of personal relationship contemplated in the exception. The hearing-officer job itself required Goodwin to assert her independent judgment free from any direction from others, including Judge Corrigan. While it can be said that Goodwin offered "advice" to Judge Corrigan in the sense of providing recommendations for the disposition of cases, this "advice" was of a formal, detached nature, from one judicial officer to another. Any doubt that might exist that Goodwin functioned as an "immediate adviser" is resolved by the explicit Congressional intent that "this exemption shall be construed narrowly." Joint Explanatory Statement of Managers at the Conf. on H.R. 1746, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Ad. News 2179, 2180 (1972).[10]

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[10] We note also the District Court's holding that "plaintiff was not hired by Judge...Hoester to be on his or any other judge's personal staff but instead was hired as a county employee." *Goodwin v. Circuit Court of St. Louis, Missouri,* No. 80-1330 C (2), slip op. p. 6 (E.D.Mo. Dec. 4, 1981) (Nangle, J.) (D.R. 82). This holding is based on the District Court's understanding of the statutes and judicial practices of its own State. On such questions we normally defer to the decisions of the district courts.

Our holding that Goodwin was not an "immediate adviser" makes it unnecessary to decide the further question whether Missouri Circuit Judges, who are initially appointed by the Governor and are thereafter

B. The burden of proof under Title VII.

The District Court's opinion states:

> After Goodwin's prima facie case is established, the burden shifts to the Circuit Court to show a non-discriminatory purpose for the selection of Donis over Goodwin or that Goodwin was not treated differently from the other persons available for the hearing officer position.

Goodwin v. Circuit Court of St. Louis County, 555 F.Supp. 658, 662 (E.D.Mo. 1982).

This statement of the law is incorrect. In *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the Supreme Court expressly stated that the only burden that shifts to the employer-defendant in Title VII actions is the burden of production; the burden of persuasion on the issue of discrimination remains on the plaintiff at all times.[11] To correct this error, we remand the

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retained unless the people at periodic elections vote otherwise, but who do not face named opposing candidates at the polls, are "elected to public office" wihtin the meaning of § 2000e(f). *Compare Goodwin v. Circuit Court of St. Louis County, Missouri, supra,* slip op. p. 6 (D.R. 82) (Nangle, J.) (implying that Circuit Judges are not "elected" for this purpose), *with Marafino v. St. Louis County Circuit court, supra,* 537 F.Supp. at 211 (Filippine, J.) (assuming that Circuit Judges are "elected").

[11] Ordinarily, when § 1983 and Title VII claims are tried jointly, the § 1983 theory to the jury and the Title VII theory to the court, a jury verdict on the issue of discrimination would collaterally estop the parties with respect to that issue on the Title VII claim. See, *e.g., Sisco v. J.S. Alberici Constr. Co.,* 655 F.2d 146, 151 (8th Cir. 1981), *cert. denied,* 455 U.S. 976 (1982). We decline to affirm the Title VII judgment on that basis in the peculiar circumstances of this case. No one has argued this application of estoppel by judgment, either here or below. Counsel for all parties seem to have assumed that the court would make its own finding on the issue of discrimination, whichever way the jury verdict went on the § 1983 case. Therefore counsel for

case to the District Court for certification of what its finding would have been had it properly placed the burden of persuasion on the plaintiff.

C. Judicial immunity of the Circuit Court.

The Circuit Court argues that it is cloaked with judicial immunity because the transfer of Goodwin to the legal department was an act in the official judicial capacity of Judge Corrigan. We disagree. The decision of whom to retain as a hearing officer is not an official judicial act. It is an administrative personnel decision. See *Marafino v. St. Louis County Circuit Court, supra,* 537 F.Supp. at 211.[12]

IV. Conclusion

In summary, we affirm the judgment entered against Judge Corrigan under 42 U.S.C. § 1983. The judgment against the Circuit Court under Title VII is vacated, and the cause is remanded to the District Court with directions to make a new finding on the issue of discrimination *vel non,* this time having clearly in mind that the burden of persuasion on that issue remains at all times on the plaintiff. We ask the District Court to make this new finding as soon as reasonably practicable and to certify it to this Court. In the meantime, we will retain jurisdiction of the appeal in order to review the District Court's new finding, after it is certified to this Court, under the clearly-erroneous rule of Fed.R.Civ.P. 52(a). If this issue is ultimately resolved in the plaintiff's favor, we will then consider the appeal of the third-party defendant St. Louis County from the judg-

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the Circuit Court felt no real incentive to make independent objections to or requests for jury instructions. Res judicata is not an inflexible dogma. It would be unfair to apply it against the Circuit Court here.

[12] For the same reasons we also reject Judge Corrigan's claim to judicial immunity from suit under § 1983.

ment entered against it on the third-party claim of the Circuit Court. If, on the other hand, the issue of discrimination is ultimately resolved in favor of the defendant Circuit Court, the appeal of the County will be moot.

Affirmed in part, vacated in part, and remanded.

BOWMAN, Circuit Judge, concurring in part and dissenting part.

I agree that the district court erroneously shifted the burden of persuasion in rendering its judgment against the Circuit Court of St. Louis County. To that extent, I concur in our Court's disposition of the Title VII claim. With respect to our Court's affirmance of the judgment entered against Judge Corrigan under 42 U.S.C. § 1983, however, I dissent because I do not view the evidence as being sufficient to support the jury's verdict against Judge Corrigan. The real issue is not whether Judge Corrigan has or ever had a bias against women. Rather, the issue is whether he made a decision adverse to Goodwin on the basis of her sex. In my opinion, the evidence falls woefully short of showing that he did, and accordingly the verdict in Goodwin's favor should not be allowed to stand.

The hearing officer positions, one held by Goodwin and one held by Donis, were to be eliminated. Goodwin has not alleged that the decision to eliminate those positions flowed from improper motives or was in any way unlawful. With that decision already made, Judge Corrigan then had to decide which of the two hearing officers would be kept on for a few months in a temporary hearing officer position and which of them would be transferred without any reduction in pay or benefits, to a permanent position on the legal staff. He consulted with an executive committee of juvenile court officials, one of whom was a woman. Although this committee was unanimous in its view that Donis was the stronger of the two candidates, the members were evenly divided on the question of which candidate should

be assigned to which position.[1] Judge Corrigan's decision to retain Donis in the temporary hearing officer position was in no way inconsistent with the views of the committee.

Judge Corrigan also was aware that the duties of the temporary hearing officer would be restricted mainly to hearing juvenile court traffic cases. He knew that Donis had considerable recent experience with such cases and that Goodwin did not.[2] Beyond that, Judge Corrigan had not received any criticism of Donis's performance, and he knew that Donis's work as a hearing officer was well regarded. On the other hand, Judge Corrigan had received adverse comments regarding Goodwin's performance as a hearing officer. The opinion of the Court misperceives the significance of this criticism of Goodwin's legal abilities when it suggests that the jury was free to disbelieve the witnesses who stated that they thought Goodwin's legal abilities were lacking. The ultimate view of a jury concerning the credibility of Goodwin's critics does not matter, what matters is that Judge Corrigan had such criticism before him, that he did not find it unbelievable, and that it was part of the totality of information on which he based his decision. Furthermore, Judge Corrigan had had the opportunity to review findings of fact, conclusions of law, and recommendations made by Goodwin in numerous cases. He personally had evaluated her work as a hearing officer and had developed misgivings about it.

The only evidence that even remotely could be construed as an indication of unlawful discrimination on the part of Judge

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[1] The committee members had differing views as to the relative importance of the two positions, not as to the strengths of the two candidates. The two committee members who voted to retain Goodwin as the hearing officer did so because they wanted the stronger candidate, Donis, placed on the permanent legal staff. The two committee members who voted to retain Donis as the hearing officer did so because they believed it was necessary to fill that position with the stronger candidate.

Corrigan consists of two remarks he made.[3] One of the remarks was jokingly made in the context of a discussion concerning a decision made by Corinne Richardson, head of the legal department. The other remark, which occurred during an en banc meeting of the circuit court, was made more than one year after Judge Corrigan transferred Goodwin. Given the context of the first remark and the time frame of the second, the relevancy of this evidence becomes, at best, highly questionable. What we are left with are two highly prejudicial remarks of minimal probative value, evidence of which could well have been excluded by the district court in the exercise of its sound discretion. *See* Fed.R.Evid. 403.

A strained interpretation of this evidence might lead one to infer that Judge Corrigan was, *in general,* biased against women and that he acted upon such a bias. That interpretation is, however, illogical. If in fact Judge Corrigan's decision was motivated by imprmissible bias, one would think that he would have placed Goodwin, rather than Donis, in the temporary position. The action he took was totally inconsistent with such a bias or with a desire to rid the court of women. Quite to the contrary, the record establishes by uncontradicted testimony that Judge Corrigan consistently made fair and unbiased decisions affecting femaly employees of the court, that he hired women for positions with the court, and that on a least one occasion he restructured a position to meet the needs of a female staff member for part-time employment. This is hardly the record of a man driven by a bias against women.

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[2] While Goodwin had heard traffic cases in her early years of service as a hearing officer, 90 percent of her case docket since 1976 had been abuse and neglect cases.

[3] The text of these remarks is set forth *supra* in section II.C. of the Court's opinion.

Moreover, even if the evidence could be read as indicative of a general bias, it would not prove the specific act of which Goodwin complains. There is a vast difference between a general bias and an act of intentional discrimination. Unless the onset of an Orwellian nightmare is closer at hand than most of us have realized, in our society the law still punishes bad deeds, not bad thoughts or the expression of unfashionable opinions. Expression may color conduct or explain motive, where motive is in question, but expression that at most tends to show a general bias toward a protected group cannot be allowed to serve as a total substitute for direct proof of unlawful discrimination. In this case there is a total absence of such direct proof. What has happened is that Judge Corrigan has been found guilty because of the atmospherics created by his remarks, not because Goodwin properly carried her burden of persuasion on the issue of intentional discrimination.

The result of Judge Corrigan's decision was Goodwin's transfer to a permanent position on the legal staff of the court, at no reduction in pay or benefits. Donis stayed in the one remaining hearing officer position, handling juvenile traffic cases until, as anticipated, the position was phased out approximately a year later. Donis then was out of a job with the court. I have great difficulty in viewing this as a decision adverse to Goodwin. By any objective standard, the decision Judge Corrigan made was favorable to Goodwin. Her claim would be a much more sympathetic and understandable one if in fact she had been retained in the temporary, soon-to-be-phased-out hearing officer position. Indeed, if Judge Corrigan had decided to put Goodwin in the temporary position she now claims to have wanted it is hard to imagine that she would not have attacked *that* decision on grounds of sexual bias. It troubles me deeply that we are sustaining a judgment against Judge Corrigan when it appears likely that either of the actions he could have taken regarding Goodwin's employment status would have subjected him to the same attack, and under the decision of the Court, to the same liability. This strikes me as being manifestly unjust.

In short, Goodwin's evidence cannot reasonably be viewed as sufficient to establish her case. Even under this Court's stringent standards, *see, e.g., Bauer v. Norris,* 713 F.2d 408 (8th Cir. 1983), Judge Corrigan should have been granted a directed verdict or a judgment notwithstanding the verdict.

For the reasons indicated above, I would reverse the § 1983 judgment against Judge Corrigan. Furthermore, because evidence insufficient to support a sex discrimination claim under § 1983 likewise is insufficient to support the same claim under Title VII, the Title VII judgment against the circuit court should be reversed for insufficiency of the evidence as well as on the ground set forth in the opinion of the Court.

APPENDIX B

Mary Susan Goodwin,
Plaintiff,

v.

The Circuit Court of St. Louis County, Missouri, and William M. Corrigan,
Defendants,

v.

St. Louis County, Mo.,
Third-Party Defendant.

No. 80-1340C(5).

United States District Court,
E.D. Missouri, E.D.

Dec. 30, 1982.

MEMORANDUM OPINION

CAHILL, District Judge.

This matter is before the Court for final disposition on the merits of Count I of Mary Susan Goodwin's complaint and for ruling on the merits of the third-party complaint filed by the defendant Circuit Court of St. Louis County (Circuit Court) against St. Louis County, Missouri (the County).

Goodwin initiated this action by filing a two-count complaint alleging that she was "demoted" from her position as a hearing officer for the Juvenile Division of the Circuit Court because she is a woman. Count I alleges that the Circuit Court violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, and Count II alleges that defendant the Honorable William M. Corrigan individually contravened the Civil Rights Act of 1866, particularly 42 U.S.C. § 1983, by displacing Goodwin from her hearing officer position because of her sex.

Count II was tried to a jury that found for Goodwin and awarded her one dollar as nominal damages and $1,000 punitive damages. Goodwin's Title VII claim was tried to the Court simultaneously with the jury tried § 1983 cause of action. The parties also have presented stipulations of fact and legal memoranda on the Title VII claim for the Court's consideration. Goodwin seeks the following relief under Count I: 1) a finding that the Circuit Court engaged in unlawful employment practices, 2) an order requiring the Circuit Court to reinstate Goodwin to her position as hearing officer, and to compensate her for lost employment opportunities and benefits and for the disadvantages and adverse effects of her alleged demotion, 3) an order enjoining the Circuit Court from engaging in the alleged unlawful employment practices, and 4) reasonable attorney's fees and costs of litigation. The Circuit Court asserts in its third-party complaint that the County is liable for all relief that the Court awards Goodwin under Count I of the complaint. Based on the following findings of fact and conclusions of law, the Court finds for Goodwin on Count I of the complaint and for the Circuit Court on the third-party complaint.

FINDINGS OF FACT

A. Goodwin's Complaint.

1. Mary Susan Goodwin is a female citizen of the United States and a resident of the State of Missouri. At all relevant times herein she was employed by the Circuit Court and paid by St. Louis County, Missouri. Since the adoption of the nonpartisan court selection system for the Circuit Court in August, 1970, the judges of the Circuit Court may retain such office only on approval of a majority of those voting on the proposition at periodic elections. However, the judges initially are appointed by the Governor of Missouri.

2. The Circuit Court is vested with part of the judicial power of the state by Article II, Section 1, and Article V, Sections 1 and 14, of the Missouri Constitution. The Juvenile Court is a

division of the Circuit Court and is responsible for the care, protection, and discipline of children who come within its jurisdiction.

3. The Juvenile Code, Mo.Rev.Stat. Chapter 211, confers broad powers on the Juvenile Court to carry out the statutory purposes of facilitating the care, protection and discipline of children who come within the Court's jurisdiction. Both Chapter 211 and the Rules of Practice and Procedure in Juvenile Court, adopted December, 1975, call for hearings to be held during the various stages of the continuing supervision of the children within the jurisdiction of the Court.

4. Goodwin was hired to work in the Juvenile Court on November 1, 1971. She was selected and sworn in as a Hearing Officer by the then Juvenile Court Judge, Robert Hoester. Judge Hoester was appointed to that position by Missouri Governor Blair in 1958. At all times material herein, the primary function of a hearing officer was to hear cases and make proposed findings and recommendations regarding their disposition to the Juvenile Judge. Goodwin was a hearing officer from November 1, 1971 to March 15, 1979, and during that period she worked for Judges Hoester, Lasky, Edwards, and Corrigan.

5. At all times relevant in this case, the position of hearing officer was not subject to the civil service laws of St. Louis County or the State of Missouri.

6. The position of hearing officer is neither authorized by Missouri statutory law or case law. That position was instituted by the Circuit Court's judges under their inherent administrative powers to efficiently and effectively run the juvenile court system. An executive committee of Circuit Judges (the Committee) oversees the operations of the juvenile court. Traditionally, the presiding juvenile court judge is chairperson of the Committee.

7. At the time Judge Corrigan became the Juvenile Court Judge, January 1, 1979, there were five persons, including himself, who were hearing and adjudicating cases. These included Commissioner Walton LeMay and hearing officers Sam Oliver, Craig Donis, and Goodwin. On March 1, 1979, Robert Branom was appointed by the Circuit Court en banc to become a second commissioner. Juvenile Court Commissioners are authorized by state law.

8. Judge Corrigan declined the position of chairperson of the Committee. However, keeping with tradition, the judges left administration of the juvenile court system to the discretion of the presiding juvenile court judge, Judge Corrigan. Then presiding circuit judge, the Honorable James Ruddy, testified at trial that the circuit judges adhered to a "hands off" policy regarding administration of the juvenile court and left the operation of the juvenile court system to the presiding juvenile judge. But the presiding juvenile court judge usually reported monthly to the Circuit Court en banc and periodically, although less frequently than monthly, to the Committee. Those reports consisted of evaluations of past operations of the juvenile court and proposed actions to improve the juvenile system.

9. After Judge Corrigan became presiding judge of the juvenile court, he undertook to reorganize the juvenile court system by, *inter alia,* eliminating the three positions of hearing officer. Juvenile court officials testified that Judge Corrigan stated that "things aren't going to run smoothly around here until we get rid of these goddamn women." Judge Corrigan initially proposed to phase out the position of hearing officers by first eliminating two of the existing positions and eventually the third one. Although the record is not abundantly clear, several Circuit Court judges testified at trial that Judge Corrigan likely discussed the details of his plan to reorganize the juvenile court system, including Judge Corrigan's choice of person to retain in the remaining hearing officer position, with the Circuit Court en banc.

10. On March 15, 1979, Judge Corrigan transferred Goodwin from the position of hearing officer to a position of staff attorney in the legal department of the juvenile court. Judge Corrigan retained Craig Donis as the sole remaining hearing officer. Donis' employment at the juvenile court terminated in December, 1980. After Donis' termination, the two Commissioners and Judge Corrigan handled the entire caseload and Judge Corrigan handled the entire caseload of the Juvenile Court.

11. Goodwin's salary was not affected by her transfer to the position of staff attorney. The transfer also did not affect other economic benefits of her employment. She receives the same coverage under health insurance and pension plans and she has the same vacation benefits and sick leave. Her work schedule also was unaffected. She has suffered no economic loss as a result of her transfer. However, arguably, the position of hearing officer is more prestigious than that of staff attorney.

12. Goodwin filed a charge of sex discrimination with the Equal Employment Opportunity Commission on July 25, 1979. She filed this suit on October 16, 1981, within ninety (90) days of receipt of a "Notice of Right to Sue" issued by the Commission on August 19, 1980.

13. The Circuit Court met en banc to discuss Goodwin's lawsuit and the course of action to pursue. The Honorable Robert Hoester, who appointed Goodwin to the position of hearing officer, testified that at that meeting Judge Corrigan stated that the Circuit Court would not have had that problem (the lawsuit) if Judge Hoester had not taken Goodwin "out of the kitchen and put her into a robe." All Circuit Court judges that worked directly with Goodwin and observed her performance testified that she was a diligent and competent worker.

14. Several Circuit Court judges at trial testified that no judge inquired specifically about the reasons for Goodwin's transfer or objected to such action. Moreover, no action was taken to investigate the matter after Goodwin formally charged Judge

Corrigan and the Circuit Court with discriminatory employment practices.

B. Third-Party Complaint.

15. Third-Party defendant, St. Louis County, Missouri, is a body corporate and politic, a county of the first class of the State of Missouri, operating under a home rule Charter form of government, adopted on November 6, 1979, pursuant to the provisions of Article VI, Section 18, of the 1945 Constitution of Missouri, and having all the powers and duties prescribed by the Constitution and laws of the State of Missouri and the charter and ordinances of St. Louis County, Missouri.

16. St. Louis County is responsible for the payment of all lawful expenditures of the Circuit Court, including payment of all salaries, compensation and benefits of employment for all personnel (excluding the Judge and Commissioners) of the Juvenile Division of the Circuit Court.

17. Sections 50.640, 50.641 and 476.270, Mo.Rev.Stat., are the pertinent statutory references regarding the budget estimates and expenditures of the Circuit Court and their payment by St. Louis County.

18. The budget estimates of the Circuit Court include the Circuit Court Divisions One through Twenty, Probate Court, Juvenile Court (Children's Building, Juvenile Court Administration, Lakeside Center), Court en Banc, and Associate Circuit Court Divisions Thirty-One through Forty-Three.

19. The procedure followed by the Circuit Court and St. Louis County is that the budget estimate of the Circuit Court is submitted to the County Budget Officer. No later than 60 days prior to the beginning of each fiscal year (currently January 1) the County Executive submits to the County Council a budget for the overall operation of the County. Such budget includes an allocation for the Circuit Court. The budget is adopted by ordinance of the County Council.

20. During the course of a fiscal year, the County Executive may be executive order transfer appropriations within any department. During the course of a fiscal year, supplemental or emergency appropriations are made by the County Council by ordinance, if recommended by the County Executive. These procedures apply to the appropriations for the Circuit Court.

21. Unexpended appropriations are returned to the General Fund at the close of each fiscal year. For each of the fiscal years 1976 through 1981, there were unexpended appropriations of the adjusted appropriation sums provided for the Circuit Court. The unexpended appropriations returned to the General Fund from the Circuit Court for such fiscal years ranged from $462,000 in 1978 to $91,188 in 1980.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this controversy pursuant to 42 U.S.C. § 2000e5(f) and 28 U.S.C. § 1343.

2. The Circuit Court is a "person" within the meaning of 42 U.S.C. § 2000e(a) and an "employer" within the meaning of 42 U.S.C. § 2000e(b).

3. Goodwin was at the relevant times herein an "employee" within the meaning of 42 U.S.C. § 2000e(f).

4. Goodwin must first establish a prima facie case to succeed on the merits of this Title VII cause of action. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Goodwin presented a prima facie case by showing that 1) she is a member of a protected class (female), 2) she ws qualified for the job of hearing officer, 3) despite her qualifications she was transferred from the position of hearing officer, and 4) after Goodwin's transfer, the Circuit Court, through Judge Corrigan, awarded the sole remaining job of hearing officer to a male who has similar or less qualifications. *Meyer v. Missouri State Highway Commission,*

567 F.2d 804 (8th Cir.1977). However, some of the Circuit Court judges testified at trial that Craig Donis was an excellent candidate for the hearing officer position.

5. After Goodwin's prima facie case is established, the burden shifts to the Circuit Court to show a nondiscriminatory purpose for the selection of Donis over Goodwin or that Goodwin was not treated differently from the other persons available for the hearing officer position. *Meyer, supra,* at 807-08. There were three hearing officer positions. Two of them were initially eliminated. The record indicates that Sam Oliver, a former hearing officer, voluntarily relinquished his position. Thus, there were only two persons actually in the running for the remaining position—Goodwin and Donis. The Court finds that the Circuit Court, through Judge Corrigan, treated Goodwin's "application" for the position of hearing officer differently than Donis' because she is a woman, and has failed to rebut the inference that it discriminated against Goodwin on the basis of sex.

6. Having found that the Circuit Court is an employer within the meaning of 42 U.S.C. § 2000e(b), and that the Circuit Court was exercising its inherent administrative power when it transferred Goodwin, the Court concludes that the Circuit Court is not shrouded with judicial immunity in this instance. 42 U.S.C. § 2000e-2(a).

7. The Court finds, however, that Goodwin suffered no economic loss and is not entitled to a monetary award. Goodwin's transfer did not affect her salary or her other economic benefits of employment. She also received the same coverage under her employee health insurance and pension plans. Goodwin also has the same vacation benefits and sick leave as when she was a hearing officer. Goodwin is not entitled to reinstatement because the Court finds that the position of hearing officer has been abolished and the circumstances of this case do not warrant the affirmative relief of ordering that position reopened. *Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979).

8. The only award to which Goodwin is entitled is declaratory relief. The Court specifically finds that the Circuit Court, through Judge Corrigan, violated Title VII of the Civil Rights Act of 1964 by transferring her from the position of hearing officer to the position of staff attorney because of her sex. Injunctive relief is inappropriate because the Court is not disposed to order the Circuit Court to reinstate Goodwin to the hearing officer position. Since there is no evidence in the record of the Circuit Court's continued discriminatory practice against Goodwin, injunctive relief will be denied.

9. However, the Court does tax Goodwin's attorney's fees and costs of litigation against Judge Corrigan and the Circuit Court. 42 U.S.C. § 2000e-5(k); 42 U.S.C. § 1988.

10. On the third-party complaint, the Court finds that the County is inextricably involved in this litigation inasmuch as it is the funding source of the Circuit Court, *Marafino v. St. Louis County Circuit Court,* No. 78-1255C(3) (E.D.Mo. May 14, 1980), and that without entering judgment against it on the third-party complaint, the Court's broad powers to fashion a remedy to further the objectives of Title VII, 42 U.S.C. § 2000e-5(g), would be a nullity. Moreover, the County admits that it is responsible for the payment of all lawful expenditures of the Circuit Court. One would be hard pressed to deny that a court ruling that assesses a monetary award against the Circuit Court is not a lawful expenditure. Therefore, judgment is entered for the Circuit Court on the third-party complaint that seeks indemnity from the County for any relief awarded to Goodwin against the Circuit Court in this lawsuit.

JUDGMENT AND ORDER

In accordance with the memorandum opinion filed this day and incorporated herein.

IT IS HEREBY ADJUDGED, DECLARED, and DECREED that Mary Susan Goodwin shall have judgment

against the defendant Circuit Court of St. Louis County, Missouri, on Count I of her complaint.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that third-party plaintiff Circuit Court of St. Louis County, Missouri, shall have judgment against third-party defendant St. Louis County, Missouri, on the third-party complaint.

IT IS HEREBY ORDERED that defendants Circuit Court of St. Louis County, Missouri, and the Honorable William M. Corrigan shall pay Mary Susan Goodwin's reasonable attorney's fees and costs of this litigation.

APPENDIX C

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and the statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985 and 1986 of

this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

R.S.Mo. 478.220:

Circuit Judges may hear and determine all cases and matters within the jurisdiction of their Circuit Courts, subject, however, to the following restrictions:

(1) Circuit Judges shall not hear and determine municipal ordinance violation cases, except upon trial de novo, unless the Judge be transferred or assigned to hear and determine the case or that class of case pursuant to Section 478.240 or 478.245, R.S.Mo., or Section 6 of Article V of the Constitution; and

(2) The provisions of this Section authorizing the hearing and determination of particular cases or classes of cases by Circuit Judges shall be subject to the transfer, assignment, and disqualification provisions contained in Article V of the Constitution, in provisions of law, or in Court rules which are authorized by the Constitution or by law.